

October 27, 2004

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte Presentation*
CG Docket No. 04-208

Dear Ms. Dortch:

On Tuesday, October 26, 2004, Leonard Kennedy, Kent Nakamura, Michael Raymond, and Jared Carlson of Nextel Communications, Inc. (“Nextel”) met with Jay C. Keithley, Deputy Bureau Chief (Policy), Consumer and Government Affairs Bureau (“CGB”); Leon J. Jackler, Legal Advisor to the Bureau Chief, CGB; and Erica H. McMahon, Associate Chief, CGB. During the meeting, the Nextel representatives discussed concerns regarding the March 30, 2004, National Association of State Utility Consumer Advocates’ (“NASUCA”) Petition for Declaratory Ruling (“NASUCA Petition”), which seeks certain restrictions on the ability of telecommunications providers to price and market their services.

Specifically, Nextel expressed its concerns that the actions currently pending in state utility commissions and courts could lead to state regulation of wireless industry rate structures—a result wholly at odds with the letter and spirit of Section 332(c) of the Telecommunications Act (“Act”) as interpreted by the Commission. Thus, while Nextel disagrees with the rule proposed by NASUCA, it believes that the Commission is clearly the appropriate (and only) forum to consider these issues. Nextel also noted that the Federal Universal Service surcharge, the Federal Telecommunications Relay Service surcharge, and the Federal Programs Cost Recovery surcharge are disclosed along with Nextel’s rates in advertisements, customer contracts, and bills.

Nextel does not question the ability of states to regulate “other terms and conditions” of wireless service. Rather, Nextel urges the Federal Communications Commission (“Commission”) to set boundaries clearly delineating the policies states may implement with respect to wireless services and especially with respect to ratemaking, which the Congress expressly preempted in Section 332(c) of the Act. In particular, Nextel also urges the Commission to clarify its 1999 decision in *Southwestern Bell Mobile Systems*, which held that rate structures as well as rates were preempted under Section 332(c) of the Communications Act.¹ In response to a request from staff at the

¹ Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for

meeting, Nextel intends to provide, in the near future, a summary of the activities that state utility commissions and courts are currently taking that cross the line into Congressional preempted ratemaking actions.

At the meeting, Nextel discussed prior Commission decisions limiting state authority with respect to ratemaking in the wireless area. In *Southwestern Bell Mobile*, the Commission stated, in no uncertain terms: “[S]tates not only may not prescribe how much may be charged for these services, *but also may not prescribe the rate elements for CMRS* or specify which among the CMRS services provided can be subject to charges by CMRS providers.”² Thus, the reasonableness of wireless rates and rate structures is for the Commission alone to decide.³ The Commission held in *Southwestern Bell Mobile* that “states do not have authority to prohibit wireless carriers from charging for incoming calls or charging in whole minute increments” because such practices are part of a carrier’s rate structure.⁴ Nor, we submit, do they have authority to regulate how wireless carriers recover their costs of complying with regulatory mandates.

Nextel pointed out that the Commission’s 1992 decision in the *Wireless CPE Bundling* case held that there appeared to be “significant public interest benefits” to bundling cellular equipment with cellular service because this reduced the price of becoming a cellular customer.⁵ Early termination fees (“ETFs”) are a means of recovering the carriers’ investment in acquiring a customer if the customer terminates service before that investment is fully recovered. Stated otherwise, an ETF is clearly a rate and is part of the rate structure for wireless service. Yet pending litigation around the country challenging the legality of ETFs under state law would, if successful, undermine exclusive federal jurisdiction over wireless rates and rate structures and thwart the aforementioned public interest benefits.

The NASUCA Petition is, at its core, a fight over the reasonableness of rate structures, as NASUCA challenges wireless carriers’ right to recover costs in a particular way—*i.e.* through a monthly line item rather than usage-sensitive charges. Nextel’s, and other wireless carriers’, decision to use a flat-rated monthly line item to recover certain operating costs instead of rolling these costs into per-minute usage rates is a classic rate structure decision which should not be open to review at the state level. Nextel

Incoming Calls and Charging for Calls in Whole Minute Increments, *Memorandum Opinion and Order*, FCC 99-356, 14 FCC Rcd 19898, at ¶ 20 (1999) (*Southwestern Bell Mobile*).

² *Id.*

³ See, e.g., Petition for Declaratory Ruling on Issues Contained in Count I of White v. GTE Class Action Complaint, *Memorandum Opinion and Order*, WT Docket 00-164, 16 FCC Rcd 11558, at ¶ 17 (finding that, with respect to certain billing practices, such as billing for “ring time” on busy or unanswered calls, such practices are not *per se* unjust nor unreasonable in violation of Section 201(b) of the Act).

⁴ *Southwestern Bell Mobile* at ¶ 23.

⁵ Bundling of Cellular Customer Premises Equipment and Cellular Service, *Report and Order*, CC Docket No. 91-34, 7 FCC Rcd 4028 (1992) at ¶ 19 (*Wireless CPE Bundling*).

understands that billing practices are, of course, always subject to Commission review under the reasonableness standards expressed in Sections 201 and 202 of the Act, but respectfully disagrees with the remedy proposed by NASUCA. Nextel cautions, however, that the question of reasonableness is a federal one, not one for state utility commissions or state courts to decide.

Copies of the *Southwestern Bell Mobile* decision, the Commission's *Wireless CPE Bundling* decision, as well as copies of a recent order issued by the court in the Alameda County, California cellphone termination fee litigation were also provided the Bureau and are attached to this ex parte.

Pursuant to Section 1.1206(b)(2) of the Commission rules, this letter is being filed electronically for inclusion in the public record of the above-referenced proceeding. Should you have any questions regarding this filing, please do not hesitate to contact the undersigned.

Respectfully submitted,

/s/ Jared M. Carlson
Jared M. Carlson
Counsel, Government Affairs

cc: Jay C. Keithley
Richard D. Smith
Gene Fullano
Leon J. Jackler
Erica H. McMahon
Ruth Yodaiken